FILED
SEP 8 1992
OFFICE OF THE CLERK

No. 92-17

In the Supreme Court of the United States

OCTOBER TERM, 1992

JONATHAN J. POLLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard of review to the district court's conclusion that the government did not violate its plea agreement with petitioner.

2. Whether, in order to obtain relief under 28 U.S.C. 2255 on a claim that the government breached the plea agreement, petitioner was required to show that the breach rose to the level of error required to justify collateral relief generally.

3. Whether the tying of petitioner's plea agreement to that of his wife rendered petitioner's plea involuntary.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Bordenkircher v. *Hayes*, 434 U.S. 357 (1978)	15
Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)	9
Brady v. *United States*, 397 U.S. 742 (1970)	15
Hill v. *United States*, 368 U.S. 424 (1962)	13, 14
Mosier v. *Murphy*, 790 F.2d 62 (10th Cir.), cert. denied, 479 U.S. 988 (1986)	16
Politte v. *United States*, 852 F.2d 924 (7th Cir. 1988)	16
Raulerson v. *United States*, 901 F.2d 1009 (11th Cir. 1990)	9
Santobello v. *New York*, 404 U.S. 257 (1971)	14, 15
United States v. *Addonizio*, 442 U.S. 179 (1979)	14
United States v. *Ataya*, 864 F.2d 1324 (7th Cir. 1988)	9
United States v *Atwood*, 963 F.2d 476 (1st Cir. 1992)	9
United States v. *Benchimol*, 471 U.S. 453 (1985)	14
United States v. *Canada*, 960 F.2d 263 (1st Cir. 1992)	9
United States v. *Conner*, 930 F.2d 1073 (4th Cir.), cert. denied, 112 S. Ct. 420 (1991)	9
United States v. *Daniels*, 821 F.2d 76 (1st Cir. 1987)	16
United States v. *Fisch*, 863 F.2d 690 (9th Cir. 1988)	10
United States v. *Frady*, 456 U.S. 152 (1982)	8
United States v. *Jimenez*, 928 F.2d 356 (10th Cir.), cert. denied, 112 S. Ct. 164 (1991)	9
United States v. *Krasn*, 614 F.2d 1229 (1980)	10

Cases—Continued:

Page

United States v. *Marquez*, 909 F.2d 738 (2d Cir. 1990), cert. denied, 111 S. Ct. 957 (1991) 16
United States v. *Moscahlaidis*, 868 F.2d 1357 (3d Cir. 1989) 9
United States v. *Nuckols*, 606 F.2d 566 (5th Cir. 1979) . 16
United States v. *Shorteeth*, 887 F.2d 253 (10th Cir. 1989) 10

Constitution, statutes and rule:

U. S. Const. Amend. V (Due Process Clause) 14, 16
18 U.S.C. 794(c) 2
28 U.S.C. 2255 ..... 2, 5, 7, 8, 13, 14, 15
Fed. R. Crim. P. 35 5

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-17

JONATHAN J. POLLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 959 F.2d 1011. The opinion of the district court (Pet. App. 51a-70a) is reported at 747 F. Supp. 797.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1992. On June 10, 1992, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 2, 1992, and the petition was filed on July 1, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the District of Columbia, petitioner was convicted of conspiracy to deliver defense information to a foreign government, in violation of 18 U.S.C. 794(c). He was sentenced to life imprisonment. Petitioner did not appeal his conviction or sentence. He subsequently filed a motion under 28 U.S.C. 2255 to vacate his conviction and withdraw his guilty plea. The district court denied the motion, Pet. App. 51a-70a, and the court of appeals affirmed, *id.* at 1a-50a.

1. Between June 1984 and November 1985, petitioner, an Intelligence Research Specialist with the United States Navy, removed large amounts of highly classified United States intelligence information from his office, copied it, and delivered it to agents of the Government of Israel. In November 1985, agents of the FBI and the Naval Investigative Service questioned petitioner about those activities. During the questioning, petitioner called his wife, Anne Pollard, and alerted her (through the use of a code word) to the fact that he was being questioned. Anne Pollard then removed a suitcase containing classified information from the Pollards' apartment and informed petitioner's Israeli handlers that he was being questioned. Pet. App. 3a-4a.

On November 21, 1985, petitioner was arrested and charged with transmitting defense information to a foreign government. The next day, Anne Pollard was arrested and charged as an accessory. Both petitioner and his wife were initially held without bond, but Anne Pollard was released on bail in February 1986 because of medical problems. During questioning both before and after his arrest, petitioner refused to identify the foreign government to which he delivered the classified information or the foreign intelligence agents involved, thereby

enabling his Israeli handlers to leave the United States without being apprehended. Pet. App. 4a.

2. After his arrest, petitioner and the government began plea negotiations. Petitioner sought to enter a plea in part to enable his wife to do so as well. In May 1986, petitioner agreed to plead guilty to one count of conspiracy to deliver national defense information to a foreign government. He promised to cooperate fully with the government's ongoing investigation and damage assessment and not to disseminate any information concerning his crimes without submitting to preclearance by the Director of Naval Intelligence. In return, the government agreed not to charge petitioner with additional crimes and to enter into a plea agreement with Anne Pollard. Petitioner's plea agreement provided that failure by Anne Pollard to adhere to the terms of her agreement would entitle the government to void his agreement, and her agreement contained a mirror-image provision. Pet. App. 4a-5a, 7a, 79a, 82a-83a.

In addition, petitioner's plea agreement contained the following provisions (Pet. App. 77a):

> (a) When [petitioner] appears before the Court for sentencing * * * the Government will bring to the Court's attention the nature, extent and value of his cooperation and testimony. Because of the classified nature of the information [petitioner] has provided to the Government, it is understood that particular representations concerning his cooperation may have to be made to the Court *in camera*. In general, however, the Government has agreed to represent that the information [petitioner] has provided is of considerable value to the Government's damage assessment analysis, its investigation of this criminal case, and the enforcement of the espionage laws.

> (b) Notwithstanding [petitioner's] cooperation, at the time of sentencing the Government will recommend that the Court impose a sentence of a substantial period of incarceration and a monetary fine. The Government retains full right of allocution at all times concerning the facts and circumstances of the offenses committed by [petitioner]. * * * [Petitioner] understands that, while the Court may take his cooperation into account in determining whether or not to impose a sentence of life imprisonment, this agreement cannot and does not limit the court's discretion to impose the maximum sentence.

At a hearing on June 4, 1986, the district court questioned petitioner about the rights he was surrendering by pleading guilty, his understanding of the possible sentence he faced, and the terms of the agreement. After being assured by petitioner and his attorney that petitioner understood the agreement, the district court accepted petitioner's guilty plea. Pet. App. 6a.

3. In memoranda submitted to the district court prior to sentencing, the government maintained that petitioner had seriously damaged the national security and that he was not remorseful for his actions. The government also noted that petitioner had violated the terms of the plea agreement by giving interviews to a member of the press without obtaining the approval of the Director of Naval Intelligence. The government supported its filing with a classified memorandum from the Secretary of Defense, which catalogued the damage that petitioner had caused to the national security, represented that the damage had been "substantial and irrevocable," and requested "severe punishment." Pet. App. 6a-7a, 98a. The Secretary of Defense also submitted an unclassified declaration reaffirming those submissions. *Id.* at 6a-7a, 99a-101a. Petitioner emphasized the extent and value of his cooperation. *Id.* at 7a.

After hearing allocution, the district court sentenced petitioner to life imprisonment and Anne Pollard to five years' imprisonment. Petitioner did not appeal his conviction or sentence. He did, however, file a timely motion under Fed. R. Crim. P. 35 for reduction of his sentence, on the ground that the sentence was disproportionate to those imposed on other individuals convicted of espionage whose actions were arguably more damaging to the United States. The district court denied that motion, and petitioner did not appeal. Pet. App. 7a.

4. In March 1990, petitioner filed the motion under 28 U.S.C. 2255 that is at issue here. The district court denied the motion. Pet. App. 51a-70a. It first rejected petitioner's contention that the government had violated a promise not to seek a life sentence, concluding that the declaration by the Secretary of Defense did not improperly argue for a life sentence and that the government had not failed adequately to advise the court of petitioner's cooperation. *Id.* at 59a-64a. The court also held that petitioner's plea had been knowing and voluntary and that he had not been coerced into pleading guilty by the "wiring" of his plea to his wife's plea. *Id.* at 66a-68a.[1]

[1] When he filed his motion under 28 U.S.C. 2255, petitioner appended an affidavit of Professor Alan Dershowitz stating that Dershowitz had asked retired Justice Arthur Goldberg to investigate the reasons for petitioner's life sentence. According to the affidavit, Justice Goldberg discussed the matter with the sentencing judge (Chief Judge Aubrey Robinson), who told him that petitioner had provided Israel with information demonstrating U.S. knowledge of Israeli-South African defense cooperation, and that those details had "weighed heavily" in the sentence. Dershowitz claimed that petitioner had never provided the Israelis with such information and that Justice Goldberg therefore inferred that the prosecution might have made an improper ex parte submission to the district court. The affidavit stated that Justice Goldberg re-

5. The court of appeals affirmed. Pet. App. 1a-50a. Initially, the court held that petitioner's plea was not rendered involuntary because it was "wired" to his wife's. *Id.* at 12a-15a. The court acknowledged that "a threat of long imprisonment for a loved one" could constitute a strong inducement for a defendant to plead guilty, but it concluded that the inducement here did not render petitioner's plea involuntary. *Id.* at 13a-14a. The court likewise held that Anne Pollard's illness did not affect the voluntariness of petitioner's plea. In the court's view, "[t]he appropriate dividing line between acceptable and unconstitutional plea wiring does not depend upon the physical condition or personal circumstances of the defendant; rather, it depends upon the conduct of the government." *Id.* at 14a-15a. Here, the court found no evidence that the government acted in bad faith. *Id.* at 15a.

The court of appeals also held that the government did not breach the plea agreement during allocution. At the outset, the court held that, although "[t]he meaning of a plea agreement—at least its facial meaning—is * * *

---

lated this information to Dershowitz before Justice Goldberg died on January 18, 1990. Pet. App. 7a-8a.

Petitioner moved to disqualify Judge Robinson on the ground that he had knowledge of the matters in the affidavit and thus might be a witness at an evidentiary hearing on the motion. Pet. App. 8a. Judge Robinson stated that he did not receive ex parte information from the government and concluded that because his knowledge of the disputed facts had been gained in a judicial, as opposed to a personal, capacity, he need not disqualify himself. *Id.* at 54a, 58a. The court of appeals affirmed the district court's rulings on these points. *Id.* at 32a-34a. It characterized the Dershowitz affidavit as "a very weak submission" that "did not suffice to require a hearing into the question it raised," without regard to Judge Robinson's attestation that he had not entertained ex parte contacts with the government. *Id.* at 33a. Petitioner does not challenge the court of appeals' disposition of that issue.

reviewed *de novo*," a claim that the "government's allocution violated limitations in a plea agreement * * * presents a mixed question of law and fact in which the factual aspects usually predominate," and that a deferential standard of review was appropriate on that issue. Pet. App. 17a. On the merits, the court rejected petitioner's contention that the submission by the Secretary of Defense constituted an implicit argument for a life sentence. It concluded that although the "government pressed its case against [petitioner] at sentencing with considerable force," the Secretary's call for a "severe punishment" was not "equivalent to an appeal for a life sentence." *Id.* at 20a-21a. The court similarly rejected petitioner's claim that the government failed to abide by its obligation to describe his cooperation to the sentencing court, *id.* at 21a-25a, and his claim that the government violated the plea agreement by commenting on his motives for committing the offense and his character, *id.* at 25a-32a.

Judge Williams dissented. Pet. App. 36a-50a. He agreed that the "wiring" of petitioner's plea to his wife's did not render petitioner's plea involuntary, and that an appellate court should review deferentially a district court's ruling that the government's allocution did not violate the terms of a plea agreement. *Id.* at 37a-39a. Judge Williams believed, however, that the government had violated the "spirit" of petitioner's plea agreement in its description of petitioner's cooperation and its sentencing recommendation, and had violated the terms of the agreement by failing to allocute only on the "facts and circumstances" of petitioner's offense. *Id.* at 41a-47a.

ARGUMENT

1. Petitioner contends (Pet. 12-26) that he is entitled to relief under 28 U.S.C. 2255 because, in his view, the

government violated the plea agreement in its submissions to the district court at sentencing. After a searching analysis, the court of appeals rejected that contention. Further review is not warranted.

In the first place, this case would not be an appropriate vehicle for consideration of the legal issues petitioner raises, because there is a threshold obstacle to petitioner's challenge to his conviction on this ground: petitioner did not object to the government's submissions at the time of sentencing, when he filed a motion for reduction of sentencing, or by taking an appeal, and petitioner has not satisfied the cause-and-prejudice standard for excusing his procedural default in these proceedings under 28 U.S.C. 2255. See *United States* v. *Frady*, 456 U.S. 152 (1982). Although the court of appeals chose not to resolve the procedural default issue, and instead to reject petitioner's claim of a plea-agreement violation on the merits (see Pet. App. 10a-11a), this Court would be presented at the outset with the waiver issue. Furthermore, as the court of appeals pointed out (Pet. App. 11a), the failure by petitioner and his counsel to object to the government's allocution at the time greatly undermines the credibility of petitioner's assertion three years later that the government's actions constituted the sort of miscarriage of justice for which collateral relief under 28 U.S.C. 2255 was intended. Petitioner committed a grave offense against the United States, and the sentence imposed by the district court was entirely appropriate to the seriousness of the offense.

a. Petitioner first contends (Pet. 12-19) that the Court should grant certiorari to consider the appropriate standard to be applied by a court of appeals in reviewing a district court's determination that the government adhered to a plea agreement. The court below held that the meaning of a plea agreement, at least on its face, presents a question of law that is reviewed de novo, but

that the district court's resolution of any disputed factual issues is reviewed under the clearly erroneous standard. Pet. App. 17a-20a. As petitioner acknowledges (Pet. 17), the distinction between issues of fact and issues of law for reviewability purposes is well grounded in this Court's decisions. See, *e.g.*, *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984).

Morever, contrary to petitioner's contention (Pet. 12-14), there is no circuit conflict on the reviewability issue that warrants review here. The decisions of the Fourth, Seventh, and Eleventh Circuits that petitioner cites (Pet. 12-13) properly applied the clearly erroneous standard of review to the district court's resolution of disputed issues of fact relevant to the question whether there was a breach of a plea agreement. See *United States* v. *Conner*, 930 F.2d 1073, 1076 (4th Cir.), cert. denied, 112 S. Ct. 420 (1991); *United States* v. *Ataya*, 864 F.2d 1324, 1337 (7th Cir. 1988); *Raulerson* v. *United States*, 901 F.2d 1009, 1012 (11th Cir. 1990). Those decisions (and the decision below) are, in turn, consistent with the decisions of the First, Third, Ninth, and Tenth Circuits on which petitioner relies (Pet. 13-14) in support of his contention that a de novo standard is appropriate.

For example, the Third Circuit, in *United States* v. *Moscahlaidis*, 868 F.2d 1357, 1360 (1989), explicitly stated that the clearly erroneous standard of review applies to factual issues, but that the ultimate question whether the plea agreement was violated is subject to plenary review. The First Circuit cited *Moscahlaidis* with approval in *United States* v. *Canada*, 960 F.2d 263, 269 (1992), and *United States* v. *Atwood*, 963 F.2d 476, 478 (1992). Similarly, in stating that de novo review was appropriate in *United States* v. *Jimenez*, 928 F.2d 356, 358, cert. denied, 112 S. Ct. 164 (1991), the Tenth Circuit

relied on its prior decision in *United States* v. *Shorteeth*, 887 F.2d 253 (1989), which (likewise citing *Moscahlaidis*) observed that because the facts were undisputed, a de novo standard of review was appropriate. See 887 F.2d at 256. Finally, the published Ninth Circuit decision on which petitioner relies, *United States* v. *Fisch*, 863 F.2d 690 (1988), was a per curiam ruling in which the court stated only that it was reviewing de novo the defendant's contention there that the government breached the plea agreement. *Fisch* did not address the standard for reviewing the district court's resolution of any disputed issues of fact that may be relevant to that inquiry, and it therefore does not conflict with the decision below.

Despite his reliance on the supposed conflict among the decisions just discussed, petitioner acknowledges the difference recognized in those decisions between issues of fact and issues of law for standard-of-review purposes. He also concedes that the court below applied a de novo standard in reviewing the meaning of the plea agreement and applied the clearly erroneous standard only in reviewing the district court's factual assessment of the government's conduct. See Pet. 14. Petitioner nevertheless contends (Pet. 14-15) that review is warranted because there are differences among appellate rulings regarding the nature and scope of the de novo and clearly erroneous standards of review. Specifically, he points out that the court of appeals in this case held that "[t]he meaning of a plea agreement—at least its facial meaning—is of course reviewed *de novo*," Pet. App. 17a, but that the Ninth Circuit held in *United States* v. *Krasn*, 614 F.2d 1229, 1233 (1980), that "[w]hat the parties agreed to" is a question of fact subject to the clearly erroneous standard. Even if there were a clear circuit conflict in the subcategory of cases involving the meaning of a plea agreement, however, this case would not present a suitable occasion for resolving it, because the court below

applied the more stringent de novo standard of review that petitioner urges.

In any event, not all issues concerning the contents of a plea agreement can be placed in one category or the other. When the question is whether the government breached an unambiguous term of a written plea agreement, the meaning of that term is subject to de novo review. In other cases, however, the defendant may contend that the parties agreed to a condition that was not reduced to writing, or to an interpretation of a term in the written document. In such a case, the question whether the parties actually agreed to the unwritten condition or interpretation is one of fact, and the district court's resolution of that question is subject to review under the clearly erroneous standard. The decision below is consistent with this view, for it states that at least the "facial" meaning of the agreement is subject to de novo review, thereby leaving open the possibility in other cases that factual issues beyond the face of the agreement would be governed by a different standard of review.

Finally, the standard-of-review issue petitioner raises would have no effect on the outcome of his challenge to his conviction. The court of appeals analyzed petitioner's claim with a level of detail that manifests a searching inquiry. The court parsed the Secretary of Defense's submission to determine whether it contained an implicit appeal for a life sentence,[2] and the court stated its conclusion in a manner that indicates that it would have reached the same result under any standard of review: "we do not think that in [pressing its case

[2] Although the plea agreement did not expressly forbid the government from recommending a life sentence, petitioner maintains that the government made such a promise implicitly, and the court of appeals decided the case on the assumption that such an implicit promise had been made. See Pet. App. 16a, 20a.

against petitioner] the government violated its promise not to recommend a life sentence; certainly we find no clear error in the district judge's determination that the government adhered to its promise." Pet. App. 20a.

Similarly, the court of appeals thoroughly analyzed petitioner's claim that the government failed adequately to describe petitioner's cooperation to the district court. It recounted the government's description of petitioner's cooperation and sifted through the details of his claim that other parts of the government's submission effectively discounted that description. The court concluded, moreover, that the government's discussion of petitioner's cooperation "did not explicitly or implicitly violate the plea agreement," which again suggests that the court of appeals would have reached the same result under a de novo standard of review. Pet. App. 22a-25a. And the court engaged in an equally thorough review of petitioner's contention that the government improperly commented on his character and motivation for committing his crime. *Id.* at 25a-27a. Accordingly, petitioner received essentially the degree of appellate review he claims is appropriate.

b. Petitioner also contends (Pet. 19-26) that the court of appeals applied an improper standard for determining whether he was entitled to relief on collateral attack of his conviction. Specifically, petitioner argues that instead of holding that he was entitled to relief upon a finding that the government breached the plea agreement in any respect, the court of appeals erroneously required him to show that the breach rose to the level of a miscarriage of justice. That contention does not warrant review.

As an initial matter, the court of appeals rejected petitioner's claims that the government breached the plea agreement by implicitly arguing for a life sentence and by failing adequately to explain the extent and value of

his cooperation. Pet. App. 19a-25a. Accordingly, insofar as those alleged breaches are concerned, this case does not present the issue whether the court employed the proper standard in determining whether a breach of the plea agreement would have entitled petitioner to relief under 28 U.S.C. 2255.

The remaining breach alleged by petitioner was that the government exceeded the limits of the reservation in the plea agreement of its full right of allocution concerning the "facts and circumstances" of petitioner's offense. The court of appeals correctly held, however, that petitioner is not entitled to relief on the theory that the government violated the "facts and circumstances" provision by commenting on his motives and character at sentencing—*i.e.*, by referring to his "arrogance and deception" and describing him as "vengeful," "unworthy of trust," or "contemptuous." See Pet. App. 25a. The court of appeals found the "facts and circumstances" provision ambiguous, and it believed that considerable weight should be placed on the contemporaneous interpretation of it by petitioner's counsel, who failed to object to the government's allocution. *Id.* at 25a-27a. The court declined, however, to determine whether the "facts and circumstances" provision of the agreement was technically breached. It reasoned that even if the government's allocution "crossed the limits of the plea agreement," it fell far short of being the sort of "fundamental defect" in petitioner's sentencing or "miscarriage of justice" for which relief is available under 28 U.S.C. 2255. Pet. App. 27a-28a (quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). The court noted that petitioner and the dissenting judge below had identified "no case" in which relief was granted under 28 U.S.C. 2255 based on an allegation that the government's arguments at sentencing, Pet. App. 30a—the "mood, atmosphere, or 'rhetoric' of the government's allocution,"

id. at 31a—"amounted to an *implicit* breach of a partially ambiguous plea agreement," *id.* at 30a. That holding does not warrant review.

Petitioner still has not identified any decision of another court of appeals that has granted relief under Section 2255 based on a claim of an implicit breach of the plea agreement resulting from the tone of the government's allocution at sentencing.[3] Compare *United States* v. *Benchimol*, 471 U.S. 453, 456 (1985); *id.* at 457 (Stevens, J., concurring in the judgment). Furthermore, as the court of appeals correctly recognized (Pet. App. 11a-12a), this Court has repeatedly held that in order to obtain relief on collateral attack under Section 2255, a defendant must establish that the errors of which he complains amount to a "fundamental defect which inherently results in a complete miscarriage of justice." *Hill* v. *United States*, 368 U.S. at 428; *United States* v. *Addonizio*, 442 U.S. 179, 185 (1979). Nothing in those decisions carves out an exception for claims based on an alleged breach of a plea agreement. In fact, the court of appeals understood petitioner to have agreed with that standard in the proceedings below. See Pet. App. 11a.

Contrary to petitioner's contention (Pet. 20-21), this result is not inconsistent with *Santobello* v. *New York*, 404 U.S. 257 (1971). There, the Court held that the Due Process Clause requires the government to keep the promises it makes to induce a defendant to plead guilty. The government's failure to keep such promises entitles

---

[3] The decisions cited by petitioner (Pet. 22) in which relief was granted under Section 2255 are not to the contrary. It does not appear in those cases that the government made a distinct argument concerning the heightened standard for relief under Section 2255 (or, therefore, that the court had occasion to address that issue), and the alleged breach went much more directly to the core of the plea agreement in those cases than in this one.

the defendant to obtain relief on direct review.[4] Nothing in *Santobello* holds, however, that the Court intended to alter long-settled rules regarding the availability of relief on collateral attack of a conviction.

In any event, as the district court correctly held, the government did not breach the "facts and circumstances" provision of the plea agreement, because "motive and character, insofar as they place [petitioner's] conduct in some context and assist in the sentencing decision, are facts and circumstances of [petitioner's] crimes, and are directly relevant to the Court's task at sentencing." Pet. App. 62a. Accordingly, there is no need for this Court to consider whether the government's allocution, if it did constitute a breach of the "facts and circumstances" provision, was a fundamental defect of the sort that would warrant setting aside a conviction on collateral attack under 28 U.S.C. 2255.

2. Petitioner's final contention (Pet. 26-29) is that the government improperly "wired" his guilty plea to that of his wife. The court of appeals correctly rejected that contention.

The government may not induce a defendant to plead guilty "by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Brady* v. *United States*, 397 U.S. 742, 750 (1970). In *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 n.8 (1978), this Court noted that "a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused * * * might pose a greater danger of inducing a false guilty plea by skewing the as-

[4] Even then, relief is not available unless the defendant shows that his plea rests to a "significant degree" on the promise that was allegedly breached. 404 U. S. at 262. Petitioner's claim based on the supposed promises going to the tone of the government's allocution does not satisfy that standard.

sessment of the risks a defendant must consider." *Bordenkircher* did not, however, rule out such plea agreements, and since that decision, the courts of appeals have declined to hold that they violate the Due Process Clause. See, *e.g.*, *United States* v. *Marquez*, 909 F.2d 738, 741-742 (2d Cir. 1990), cert. denied, 111 S. Ct. 957 (1991); *Politte* v. *United States*, 852 F.2d 924, 929-931 (7th Cir. 1988); *Mosier* v. *Murphy*, 790 F.2d 62, 66 (10th Cir.), cert. denied, 479 U.S. 988 (1986); *United States* v. *Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979). Instead, the government's offer of lenient treatment to a third person is simply one factor bearing on the question whether the defendant's plea was voluntary. See *United States* v. *Marquez*, 909 F.2d at 742; *United States* v. *Daniels*, 821 F.2d 76, 80 (1st Cir. 1987).

Consistent with the views of other courts of appeals, the court in this case held that such guilty pleas are not in themselves unconstitutional, but that the government's improper use of pressure exerted on a third person could render a guilty plea involuntary. Pet. App. 12a-15a. The court then held that petitioner's plea was not rendered involuntary simply because it had been obtained in part by petitioner's desire to obtain a plea agreement for his wife. That fact-bound contention is not worthy of review, especially in light of petitioner's failure to claim that the plea arrangement caused him to plead guilty to an offense of which he is not guilty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

SEPTEMBER 1992